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February 14, 2002

## **VIA ELECTRONIC FILING**

Marjorie Reed Greene  
Associate Bureau Chief  
Cable Services Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: **City Signal Communications, Inc.**  
**Report on Status of Negotiations in CS Docket Nos. 00-253 and 00-255**

Dear Ms. Greene:

In response to your request dated January 31, 2002, City Signal Communications, Inc. ("City Signal" or "Company") is submitting this report on the status of City Signal's negotiations with the cities of Cleveland Heights and Pepper Pike, Ohio. In short, City Signal's negotiations have been unsuccessful. Cleveland Heights and Pepper Pike continue to prevent City Signal from entering the telecommunications market in their communities.

For nearly two years, City Signal has been seeking to gain non-discriminatory and competitively neutral access to Pepper Pike's and Cleveland Heights' public rights-of-way to install the Company's telecommunications facilities. In November 2000, after the cities refused to yield on their unlawful and discriminatory demands, City Signal filed the pending petitions. However, during the pendency of its petitions, in an effort to find a compromise that would allow it to enter the market on a timely basis, City Signal has continued its negotiations with the cities. To date, City Signal has been unable to gain such access to these cities' public rights-of-way. As explained below, City Signal is still trying to reach an agreement with the city of Pepper Pike for public right-of-way access, and has been forced to build its network around the city of Cleveland Heights.

### **Pepper Pike, Ohio**

As indicated in the record in this proceeding, City Signal first contacted the city of Pepper Pike in April of 2000, to discuss permitting requirements to access the city's public rights-of-way<sup>1</sup>. City Signal sought to construct its network utilizing aerial attachments, consistent with the manner

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<sup>1</sup> See City Signal's Reply Comments, Affidavit of C. Koslosky at 3 (filed Feb. 14, 2001).

in which the incumbent local exchange carrier (“ILEC”) has constructed and maintained its facilities, but Pepper Pike refused to allow such construction. Pepper Pike claimed that aerial construction was prohibited for aesthetic reasons and that City Signal would have to place its facilities underground.<sup>2</sup>

Pepper Pike’s refusal to grant City Signal rights-of-way permits for the installation of its network and the city’s demands that the Company install its facilities underground violate section 253(a) of the Communications Act of 1934, as amended. First, the substantial two-year delay that City Signal has experienced in seeking rights-of-way permits has effectively prohibited the Company from providing its telecommunications services in the city.<sup>3</sup> Second, as City Signal has shown in this proceeding, the city’s discriminatory demands that the Company place its network underground rather than above ground, while allowing the ILEC and other earlier entrants to place their facilities on poles, imposes substantially higher costs on City Signal, jeopardizing its ability to provide competitive telecommunications services.<sup>4</sup>

The provisions of section 253(c) do not protect Pepper Pike’s actions. Pepper Pike’s unreasonable delay in issuing rights-of-way permits to City Signal is not authorized management of the city’s right-of-way. Rather, it is an abuse of that authority. Second, Pepper Pike’s refusal to allow aerial construction of City Signal’s network while permitting the incumbent carriers to retain their aerial attachments, as well as upgrade and continue to attach facilities to the poles in the city, is discriminatory and is not competitively neutral as required by section 253(c).

Despite the city’s clear violations of section 253, in an effort to enter the Cleveland-area telecommunications market without further delay, City Signal attempted to negotiate an agreement with Pepper Pike to place its network underground. City Signal made this concession in hopes of facilitating a timely conclusion to the permitting process. Unfortunately, this effort has not been successful, and City Signal still is attempting to reach a reasonable agreement with Pepper Pike that would allow the installation of the Company’s network in the city’s rights-of-way. The city’s current demands for an unreasonably high surety bond and for a security interest in the Company’s

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2 Comments of Pepper Pike, Ohio at 2-3 (filed January 26, 2001).

3 See *In the Matter of Classic Telephone, Inc., Memorandum Opinion and Order*, 12 FCC Rcd. 15,619 at ¶ 28 (1997) (“*Classic Telephone I*”) (holding that “a failure by a local government to process a franchise application in due course may ‘have the effect of prohibiting’ the ability of the applicant to provide telecommunications service, in contravention of section 253.”).

4 City Signal Reply Comments at 7-8, Koslosky Affidavit at 5-6. See also *In the Matter of Classic Telephone, Memorandum Opinion and Order*, 11 FCC Rcd. 13,082, ¶ 25 (1996) (“*Classic Telephone I*”) (noting that section 253 was intended to “remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well”) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd. 15,499, ¶ 3 (1996)).

facilities have derailed the Company's efforts to finalize an acceptable agreement with the city, despite City Signal's acquiescence to the City's demand for costly underground construction. These latest developments are especially frustrating given Pepper Pike's disparate treatment of City Signal in setting the requirements for installation of its network.

### **Cleveland Heights, Ohio**

As indicated in the record in this proceeding, City Signal first contacted the city of Cleveland Heights in July 1999.<sup>5</sup> As with Pepper Pike, City Signal sought to construct its network utilizing aerial attachments, but Cleveland Heights refused to allow such construction for a significant portion of the Company's network. Like Pepper Pike, Cleveland Heights claimed that such construction was prohibited for aesthetic reasons, notwithstanding that the city still permits the ILECs and other earlier entrants to maintain their facilities on poles in the city.<sup>6</sup>

As in Pepper Pike, after facing inordinate delays, and in the hope of facilitating a timely conclusion to the permitting process, City Signal sought to negotiate an agreement with Cleveland Heights to place certain portions of its network underground. Unfortunately, the terms demanded by the city were unreasonable and economically prohibitive for City Signal. Such terms included that City Signal pay for the entire cost of installing spare facilities required by the city, of which only 1/4 of the innerducts to be installed would be used by City Signal. Moreover, Cleveland Heights demanded that the city have title to the entire underground network that was to be built and paid for by City Signal. Although City Signal may have been reimbursed over time if other utilities elected to use the conduit held by the city, the city's demand would have required City Signal to make an initial substantial capital investment in an underground network for which City Signal would have no ownership rights or assurances of reimbursement of costs within a reasonable period of time. These terms were economically infeasible and cost prohibitive for a new entrant such as City Signal. Accordingly, absent preemption of the city's unlawful requirements, City Signal has been unable to pursue its plans to construct facilities in Cleveland Heights and has been forced to reengineer its telecommunications network and build around the city.

City Signal's experience in Cleveland Heights is a clear example of the barriers to entry prohibited by section 253(a). As a result of the city's actions, City Signal has been foreclosed from providing its telecommunications services to the residents of Cleveland Heights and has been forced to bypass the city. The provisions of section 253(c) also do not protect Cleveland Heights' actions. Cleveland Heights' refusal to allow aerial construction of City Signal's network while permitting the incumbent carriers to retain their aerial attachments, as well as upgrade and continue to attach facilities to the poles in the city is, discriminatory and is not competitively neutral as required by section 253(c). In addition, several courts have preempted local ordinances pursuant to section 253 that require providers to install excess conduit for future use by other providers, finding that such

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5 City Signal's Reply Comments, Koslosky Aff., ¶ 13.

6 Comments of Cleveland Heights, Ohio at 2 (filed January 26, 2001).

a requirement exceeds permissible rights-of-way management.<sup>7</sup>

City Signal requests that the Commission expeditiously act on its petitions involving Pepper Pike and Cleveland Heights, and preempt the unlawful requirements that these two cities have imposed on City Signal as a precondition to granting permits to install telecommunications facilities.

Preemption is necessary in these cases to allow City Signal to complete the portion of its network that will traverse Pepper Pike and to extend its network into Cleveland Heights to reach potential customers there. City Signal respectfully requests that, in ordering the cities' unlawful requirements preempted, the Commission make clear that localities may not abuse their rights-of-way authority by imposing inordinate delays on new entrants who refuse to capitulate to terms that are discriminatory and not competitively neutral, and which deprive such new entrants of the opportunity to compete on a level playing field with existing providers in a market. Such deleterious actions, which the cities of Pepper Pike and Cleveland Heights have taken against City Signal, violate section 253. Therefore, the Commission should take prompt action to remedy these violations.

Please feel free to contact us if you have any questions or need additional information regarding City Signal's petitions.

Respectfully submitted,

/s/ Kathy Cooper

Jeffrey M. Karp  
Kathy L. Cooper

Counsel for City Signal Communications, Inc.

cc: Chris Gibbon, Esq., W&H  
John Gibbon, Esq. W&H  
Lisa Lutz, Esq., City Signal  
Mr. Alan Brecher, City Signal

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<sup>7</sup> *City of Auburn et al. v. Qwest Corporation*, 247 F.3d 966 (9<sup>th</sup> Cir., April 24, 2001), *opinion amended by City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9<sup>th</sup> Cir., July 10, 2001), *cert. den. by City of Tacoma v. Qwest Corp.*, \_\_S.Ct.\_\_, 2002 WL 13258, 70 U.S.L.W. 3281 (Jan. 7, 2002); *see also BellSouth v. Town of Palm Beach*, *BellSouth v. City of Coral Springs*, 252 F.3d 1169 (11<sup>th</sup> Cir., May 25, 2001).